TABLE OF CONTENTS

	Page
Complaint for Injunction	2
Exhibit "A": Decision and Direction of Election	11
Exhibit "B": Telegram Dated June 13, 1956, Ogden W. Fields to Jonas Silver of Mayer, Weiner and Mayer	18
Exhibit "C": Certification of Representatives	19
Motion of Defendants to Dismiss the Complaint or, in the Alternative, for Summary Judgment in Their Favor	20
Exhibit 1: Tally of Ballots	21
Cross-Motion of Plaintiff for Summary Judgment in Its Favor	23
Minute Entry of Clerk	23
Findings of Fact and Conclusions of Law	24
Order of December 19, 1956	31
Motion of Defendants to Drop Ivar H. Peterson as a Party Defendant	33
Order Dropping Ivar H. Peterson as a Party Defendant	34
Notice of Appeal	34
Designation of Contents of Record on Appeal	35

Proceedings in the U. S. C. A. for the District of Columbia Circuit 37
Opinion, Bazelon, J 37
Judgment 40
Clerk's certificate (omitted in printing) 40
Order allowing certiorari 41

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,701

BOYD S. LEEDOM, ET AL., individually and as Chairman and Members of and constituting the National Labor Relations Board, *Appellant*,

v.

WILLIAM KYNE, individually and as President of BUFFALO SECTION, WESTINGHOUSE ENGINEERS ASSOCIATION, ENGINEERS AND SCIENTISTS OF AMERICA, a Voluntary Unincorporated Labor Organization, *Appellee*.

Appeal From the United States District Court for the District of Columbia

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JOINT APPENDIX

Filed July 12, 1956

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2909-'56

WILLIAM KYNE, individually and as President of BUFFALO SECTION, WESTINGHOUSE ENGINEERS ASSOCIATION, ENGINEERS AND SCIENTISTS OF AMERICA, a Voluntary Unincorporated Labor Organization, P.O. Box No. 2528, Cheektowaga, New York, *Plaintiff*,

-against-

BOYD S. LEEDOM, ABE MURDOCK, IVAR H. PETERSON, PHILIP RAY RODGERS, STEPHEN S. BEAN, individually and as Chairman and Members of and constituting the NATIONAL LABOR RELATIONS BOARD, *Defendants*.

Complaint for Injunction

Plaintiff, for its complaint herein, alleges:

1. This action arises under the Labor Management Relations Act of 1947, 29 U.S.C. Sections 151 et seq., an Act of Congress regulating commerce. This Court has jurisdiction under 62 Stat. 931, 28 U.S.C. Section 1337.

2. This complaint is filed by plaintiff for the purpose of having this Court compel the defendants to direct a vote among professional employees to determine whether such professional employees wish to be included in a
2 bargaining unit with non-professional employees pursuant to Sections 9(b)(1) and 2(12) of said Act, 29 U.S.C. Sections 159(b)(1) and 152(12) as hereinafter more fully appears.

3. This action also arises under Sections 10(a), 10(b), 10(c), and 10(e) of the Administrative Procedure Act of 1946, 5 U.S.C. Sections 1001 et seq.

4. Buffalo Section, Westinghouse Engineers Association, Engineers and Scientists of America, is a voluntary unincorporated labor organization, maintaining its principal office for the transaction of its regular business at P.O. Box No. 2528, Cheektowaga, New York, and William Kyne is the President thereof.

5. Membership in Buffalo Section, Westinghouse Engineers Association, Engineers and Scientists of America, is open to all non-supervisory professional engineers and scientists employed at the Cheektowaga, New York, plant of Westinghouse Electric Corporation. Buffalo Section, Westinghouse Engineers Association, Engineers and Scientists of America, exists for the purpose of enhancing the economic and professional status of engineers and scientists who are professional employees as defined in Section 2(12) of the Labor Management Relations Act, 1947, 29 U.S.C. Section 152 (12), through collective bargaining with Westinghouse Electric Corporation.

6. Said Westinghouse Electric Corporation is engaged in an industry or activity affecting commerce within the meaning of Sections 2(6) and 2(7) of the Labor
3 Management Relations Act, 29 U.S.C. Sections 152(6) and 152(7).

7. On or about October 14, 1955, plaintiff filed a petition for certification of representatives with the Regional Director of the National Labor Relations Board for the Third Region, alleging that a substantial number of employees occupying the job descriptions of Engineer, Assistant, Engineer Associate, Engineer, Engineer Senior and Engineer Fellow, at the Cheektowaga, New York, plant of Westinghouse Electric Corporation, wish to be represented for purposes of collective bargaining by plaintiff, and plaintiff desires to be certified as representative of these employees pursuant to Sections 9(a) and (c) of the Labor Management Relations Act, 1947, 29 U.S.C. Sections 159(a) and 159(c).

8. Said petition was given Case No. 3-RC-1634 by the Regional Director of the National Labor Relations Board for the Third Region.

9. Upon the petition filed by plaintiff, hearing was conducted on March 7th and 8th, 1956 in Buffalo, New York, by an officer duly designated by the Regional Director of the National Labor Relations Board for the Third Region, pursuant to Section 9(c) of said Act, 29 U.S.C. Section 159(c). At the hearing, plaintiff, by amendment to its petition, sought to represent all professional employees within the meaning of Section 2(12) of said Act at the Cheektowaga, New York, plant of Westinghouse Electric Corporation including, in addition to the categories originally named in the petition, Manufacturing Engineer, Manufacturing Engineer Senior, Plant Layout Engineer, Methods Engineer and Purchasing Engineer.

10. At the hearing, Buffalo Salaried Employees Association, Incorporated, a labor organization, was permitted to intervene in the proceedings. The Intervenor alleged that employees at the Cheektowaga, New York, plant of Westinghouse Electric Corporation in the additional categories of Engineer Order Service, Engineer Test Record, Engineer Contact, Order Correspondent Master, and Safety Inspector were also professional employees within the meaning of Section 2(12) of said Act and should be included within the bargaining unit together with all the professional employees sought by the plaintiff in the amended petition.

11. On May 28, 1956, defendant, National Labor Relations Board, issued its Decision and Direction of Election in the aforesaid representation proceeding, finding that the employees in the categories sought to be included in the bargaining unit by plaintiff are professional employees within the meaning of Section 2(12) of said Act and that the employees in the categories of Engineer Order Service, Engi-

neer Test Record, Engineer Contact, Order Correspondent Master, and Safety Inspector are not professional employees within the meaning of Section 2(12) of said Act. In the aforesaid Decision And Direction Of Election, defendant, National Labor Relations Board, further found that all professional employees at the Cheektowaga, New York plant of Westinghouse Electric Corporation, including the categories of Engineer Assistant, Engineer Associate, Engineer, Engineer Senior, Engineer Fellow, Manufacturing Engineer, Manufacturing Engineer Senior, Plant Layout Engineer, Methods Engineer and Purchasing Engineer, as well as the non-professional Engineer, Engineer Order Service, Engineer Test Record and Engineer Contact, constitute an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Labor Management Relations Act, 1947, 29 U.S.C. Section 159(b). The defendant, National Labor Relations Board, despite the provisions of Section 9(b)(1) of said Act, nevertheless refused to direct a vote among the professional employees as such to decide whether or not they wished to be included in a unit together with the non-professional employees, as provided in Section 9(b)(1) of said Act. A copy of said Decision And Direction Of Election is hereto annexed as Exhibit "A".

12. In the aforesaid Decision And Direction Of Election, defendant, National Labor Relations Board, directed that an election be held within thirty days of the date of this Direction, among the employees in the aforesaid unit to determine whether or not they desire to be represented, for purposes of collective bargaining, by Buffalo Section, Westinghouse Engineers Association, Engineers and Scientists of America, by Buffalo Salaried Employees, Incorporated, or by neither.

13. On June 7, 1956, plaintiff filed a Motion To Stay Election, Reconsider And Amend Decision And Direction Of Election And Request For Oral Argument in the

aforesaid representation proceeding alleging that defendant, National Labor Relations Board, acted in excess of its statutory authority by including, in the same bargaining unit, professional and non-professional employees without having first accorded such professional employees an opportunity to determine by majority vote whether or not they wished to be included in such unit as required by Section 9(b)(1) of said Act.

14. On June 13, 1956, defendant, National Labor Relations Board, denied the aforesaid motion. A copy of said order denying plaintiff's motion is hereto annexed as Exhibit "B".

15. On June 14, 1956, an election by secret ballot was held under the direction of the Regional Director of the National Labor Relations Board for the Third Region among the employees in the aforesaid unit found to be appropriate by the Board, including the non-professional categories, without the professional employees having been first accorded an opportunity to determine by vote whether or not they wished to be included in such unit. The plaintiff received a majority of the valid votes cast.

16. On June 21, 1956, plaintiff was certified by the Regional Director of the National Labor Relations Board for the Third Region, acting on behalf of the defendant, National Labor Relations Board, as the exclusive bargaining representative of the professional and non-professional employees at the Cheektowaga, New York, plant of the Westinghouse Electric Corporation, including
7 employees in the categories set forth in the aforesaid bargaining unit. A copy of said certification is hereto annexed as Exhibit "C".

17. Sections 9(b) and 9(b)(1) of the Labor Management Relations Act, 1947, 29 U.S.C. Section 159(b) provide as follows:

"(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided,* That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit;"

18. Although the aforesaid Section 9(b)(1) of the Labor Management Relations Act, 1947, provides that the National Labor Relations Board shall not decide that a bargaining unit of professional and non-professional employees is appropriate unless a majority of such professional employees vote for inclusion in such unit, the defendants, Boyd S. Leedom, Abe Murdock, Ivar H. Peterson, Philip Ray Rodgers and Stephen S. Bean, as members of the National Labor Relations Board, have determined that such bargaining unit is nevertheless appropriate and have certified plaintiff as exclusive bargaining representative of employees in such unit without first ascertaining the desires of the professional employees by vote as to whether or not they wish to be included in such unit with non-professional employees, thereby failing and refusing to comply with the aforesaid Section 9(b)(1) of the Labor Management Relations Act, 1947.

19. In refusing to direct a vote among such professional employees to determine whether or not they wish to be included in the unit with non-professional employees, the defendants, Boyd S. Leedom, Abe Murdock, Ivar H. Peterson, Philip Ray Rodgers and Stephen S. Bean, as members of the National Labor Relations Board, have exceeded the scope of their statutory authority and thereby have failed and refused to comply with Section 9(b)(1) of said Act,

and have thereby further acted arbitrarily, capriciously and not in accordance with law.

20. By reason of the wrongful acts and the unlawful withholding of action by defendants hereinabove complained of, plaintiff has been, is now, and in the future will be denied a right to be selected as exclusive representative in a bargaining unit of professional employees and excluding non-professional employees should a majority of such professional employees so desire, a right guaranteed to it by virtue of the laws of the United States, to-wit: Sections 9(b)(1) and 2(12) of the Labor Management Relations Act, 1947, and has been, is now, and will be denied the protection guaranteed to it by virtue of said law to its irreparable damage unless this Court exercise the power and authority vested in it to set aside in part the Decision And Direction Of Election issued by the Board in Case No. 3-RC-1634, and to order the defendants, Boyd
9 S. Leedom, Abe Murdock, Ivar H. Peterson, Philip Ray Rodgers and Stephen S. Bean, as members of the National Labor Relations Board, to conduct an election among the aforementioned professional employees to determine whether or not a majority of such professional employees wish to be included in a unit together with employees who are not professional employees, as required by Section 9(b)(1) of said Act.

21. The plaintiff herein has no adequate remedy at law and has no means for the redress of wrongs whereof it here complains, plaintiff having exhausted its administrative remedies, except through mandatory injunction proceedings to review the actions of the defendants and to order said defendants to set aside in part the Decision And Direction Of Election in Case No. 3-RC-1634 and to conduct an election pursuant to Section 9(b)(1) of said Act as hereinabove set forth and described in this complaint.

WHEREFORE, plaintiff prays:

(a) That a permanent injunction be granted and issued from this Court to the defendants, Boyd S. Leedom, Abe Murdock, Ivar H. Peterson, Philip Ray Rodgers and Stephen S. Bean, as members of the National Labor Relations Board, committing, requiring and compelling them and the National Labor Relations Board and all those acting under and by virtue of its authority to set aside in part the Decision And Direction Of Election, and to set aside and vacate the election conducted on June 14, 1956, and to set aside and vacate the certification of representatives dated June 21, 1956, in Case No. 3-RC-1634, and further enjoining the defendant, National Labor Relations Board, from processing the petition filed in Case No. 3-RC-1634, unless defendant, National Labor Relations Board, hereafter conducts its investigation in Case No. 3-RC-1634 to ascertain representatives for purposes of collective bargaining with Westinghouse Electric Corporation in the manner provided by Section 9(b)(1) of the Labor Management Relations Act, as amended.

(b) That such other and further relief be granted as this Court deems appropriate.

MAYER, WEINER & MAYER

By: ABRAHAM WEINER
partner
19 West 44th Street,
New York 36, N.Y.

JAFFEE & DUNAU

By SAMUEL H. JAFFEE
912 DuPont Circle
Building, N.W.
Washington 6, D.C.

VERIFICATION

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

ABRAHAM WEINER, being first duly sworn, on oath deposes and says that he has read the foregoing complaint by him subscribed; that he knows the contents thereof; and that he verily believes the matters therein set forth to be true.

ABRAHAM WEINER

MAYER, WEINER & MAYER
19 West 44th Street,
New York 36, N.Y.

Subscribed to and sworn before me this 10th day of July, 1956.

JEROME WENIG

Jerome Wenig
Notary Public State of New York
Qualified in New York County
No. 81 036 985
Commission Expires March 30, 1958

11 Exhibit "A"

115 NLRB No. 228 D-9891
Cheektowaga, New York

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 3-RC-1634

WESTINGHOUSE ELECTRIC CORPORATION, *Employer*

and

BUFFALO SECTION, WESTINGHOUSE ENGINEERS ASSOCIATION, ENGINEERS AND SCIENTISTS OF AMERICA,[1] *Petitioner*

Decision and Direction of Election

Upon a petition duly filed under Section 9 (c) of the National Labor Relations Act, a hearing was held before Bernard Marcus, hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.[2]

Upon the entire record in this case, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act.

2. The labor organizations involved claim to represent certain employees of the Employer.[3]

---

[1] The name of the Petitioner appears as amended at the hearing.

[2] The hearing officer referred to the Board the motions to dismiss made at the hearing by the Intervenor. For the reasons set forth below, these motions and the motions to dismiss made in the Employer's brief are hereby denied.

[3] Buffalo Salaried Employees Association, Incorporated, herein called the Intervenor, was permitted to intervene in this proceeding on the basis of its contractual interest in the employees whom the Petitioner seeks to represent. The motion to intervene was granted without objection, but the Petitioner, later in the hearing and in its brief filed after the hearing, contended that the Intervenor had no standing as its most recent contract failed to reflect a change in its name. We find this contention without merit. Accordingly, the

3. The hearing officer referred to the Board the Petitioner's motion made at the hearing to amend the unit set forth in the petition.

12 The Employer and the Intervenor contend that the unit described in the petition is inappropriate, that the Petitioner's amendment of the proposed unit at the hearing was so substantial as to constitute a new petition, and that the contract entered into after the filing of the petition but before the amendment was therefore a bar.

The Petitioner's original proposed unit sought 5 categories of engineers, totaling 166 employees. The amendment to the petition would add 5 more categories of engineers totaling 67 employees. The parties stipulated that all the employees sought by the Petitioner are professional engineering employees. Under these circumstances, we find that the amendment did not constitute a new petition or affect the timeliness of the original filing.[4] The Petitioner's motion to amend the unit set forth in the petition is hereby granted. We find therefore that the contract is not a bar, and the motions to dismiss on this ground are denied. Accordingly, we find that a question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Section 9 (c) (1) and Section 2 (6) and (7) of the Act.

4. The unit, as set forth in the petition, sought employees in the following job descriptions: engineer assistant, engineer associate, engineer, engineer senior, and engineer

---

Intervenor's Petition to Reopen Hearing, filed on April 30, 1956, to take evidence as to its change in name, is hereby denied.

The Petitioner and the Intervenor refused to stipulate that each was a labor organization within the meaning of the Act. We find that as both the Petitioner and the Intervenor are organizations which exist for the purpose of representing employees for collective bargaining purposes, they are labor organizations within the meaning of Section 2 (5) of the Act.

[4] *Hyster Company*, 106 NLRB 347, 348.

fellow. The unit, as amended at the hearing, sought all professional employees including, in addition to the categories named in the petition, manufacturing engineer, manufacturing engineer senior, plant layout engineer, methods engineer (formerly time and motion analyst), and purchasing engineer.

As stated above, the parties stipulated that employees in all the categories set forth in the amended unit are professional employees within the meaning of Section 2 (12) of the Act. None of the parties disputed the appropriateness of a unit of professional employees nor the inclusion in such unit of all the categories in the amended unit.[5] The parties were in disagreement, however, as to the unit placement of 5 additional categories: engineer order service, engineer test record, engineer contact, order correspondent master, and safety inspector.[6] The Intervenor maintained that the employees in these categories have professional status and should be included in the unit of agreed professional employees. The Petitioner maintained that the employees in these 5 categories are not professional employees as defined in Section 2 (12) of the Act, and should therefore be excluded. The Employer took no position at the hearing with respect to the unit placement of these disputed categories, which are not classified as professional by the Employer. In its brief filed after the hearing, however, the Employer main-

13

[5] Following a consent election in 1946 (3-R-1388), the Intervenor was selected by two voting groups of professional employees and of salaried nonprofessional employees. The parties in that proceeding having agreed that in such event the two groups would be combined in a single unit, the Intervenor was certified as the bargaining representative for such unit. The parties herein stipulated at the hearing that the Employer, the Intervenor, and another labor organization, which is not a party in the present proceeding, have entered into an agreement (3-RC-1595) for a consent election in a unit of the salaried nonprofessional employees.

[6] The parties stipulated that employees in the category of machine designer are not professional, and no contention was made that they should be included. Accordingly, they are excluded from the unit.

tained that employees in 4 of the disputed categories should be included in the unit because they "are so closely allied with and integrated in the engineering operations at the plant . . . ," but that the fifth category, safety inspectors, "are rather administrative, and probably should be excluded from any unit."

There are 5 employees in the *engineer order service* category, 1 in class A, 2 in B, and 2 in C. These employees progress on the basis of training and education from C to A, which is the highest classification. All 5 do similar work but handle proportionately more difficult assignments in the higher classifications. Their work requires electrical or mechanical knowledge and experience. They check customers' orders to determine the extent to which standard or special products are called for, and estimate the amount of engineering required in order to determine when delivery to the customer can be made.

14

In some instances they develop variations in standard designs themselves and then put the orders through the factory for production, but they refer more complicated problems to the admittedly professional design engineers. They work in the same room as the design engineers, and are in constant contact with them. They report to an engineering manager, as do the employees sought by the Petitioner. Although the Employer does not require, it prefers, engineering degrees for these jobs, and some men in this category have such degrees. Men have been transferred from this category to that of engineer.

There are 3 employees in the *engineer test record* category, 1 in class A and 2 in class B. They compile data received from the test floor on such matters as currents, voltages, watts, and temperatures, into prescribed forms. Using higher mathematics, they plot the data into curves which express torques and efficiencies, power factors, losses, and regulation. They are also responsible for preparing data on curves and other forms which go to the Employer's customers.

Their work brings them into frequent contact with design engineers. They work in the same section and under the same supervision as some of the design engineers. Although not required, some of these men have engineering degrees. A few men in this category have been transferred to jobs in the engineer assistant category.

There is 1 man in the *engineer contact* category, who is the liaison man between the design engineering department and the shop. He makes on-the-spot diagnoses of trouble in manufacturing or tests, can authorize some changes in design or material, and refers others to the design engineers. He also allocates the cost of a correction to the section responsible for the error. He works frequently with design engineers, is located in the same office, and reports to the same supervisor. His job does not require an engineering degree, but the work requires some engineering skill plus considerable experience with the employer's products. Men have moved from this work to jobs in categories stipulated to be professional.

There are 3 employees in the category of *order correspondent master*. They coordinate customer orders, which may run as large as 100 carloads in shipment. Their work requires familiarity with apparatus built at the plant here involved, at other Westinghouse plants, and at plants of other companies. They handle order service papers, obtain data as to availability of equipment from engineers and from Westinghouse district offices, and relay this information to the customers. They work in the same building as the engineering sections but in a separate office. Their work is under the supervision of the order service supervisor, who also supervises a number of order service correspondents and another group which handles renewal orders.

There are 2 employees in the category of *safety inspector*. They are responsible for maintaining safety in the plant.

When necessary, they design safety devices for machines. There are no formal educational requirements for these jobs. The office of the inspectors is in the industrial relations department, in the same building as the engineering department but on a different floor. They work under a supervisor of safety, who reports to the head of the industrial relations department.

We find, upon the basis of the entire record, that the employees in the 5 disputed categories are not professional employees within the meaning of Section 2 (12) of the Act. We find further, however, that employees in the 3 categories of engineer order service, engineer test record, and engineer contact, have had considerable education and experience in the engineering field, are occasionally transferred to the professional engineering categories, work in the same general area and under common supervision with the admittedly professional engineering employees, spend much of their time collaborating and consulting with these professional employees, and share a close community of employment interests with them. Furthermore, employees in these 3 categories were included with the admittedly professional engineers in the voting group in the 1946 election. Also, it does not appear that the addition of the 9 employees in these categories to the unit of 233 employees stipulated to be professional would destroy the predominantly professional character of such a unit. Under all the circumstances, we shall include these employees in the professional unit.[7] We do not, however, find that the order correspondent masters and safety inspectors share this mutuality of employment interests with those in the unit. They were not included with the engineers in the 1946 election, and we shall exclude them from the unit here found appropriate.

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[7] *Westinghouse Electric Corporation*, 111 NLRB 497, 501; *Westinghouse Electric Corporation*, 80 NLRB 591, 594.

Accordingly, we find that the following employees at the Employer's Cheektowaga, New York, plant constitute an appropriate unit for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act: All professional employees, including the categories of engineer assistant, engineer associate, engineer, engineer senior, engineer fellow, manufacturing engineer, manufacturing engineer senior, plant layout engineer, methods engineer (formerly time and motion analyst), purchasing engineer, engineer order service, engineer test record, and engineer contact, but excluding the categories of machine designer, order correspondent master, and safety inspector, all other employees, guards, and supervisors as defined in the Act.[8]

Direction of Election

As part of the investigation to ascertain representatives for the purposes of collective bargaining with the Employer, an election by secret ballot shall be conducted as early as possible, but not later than 30 days from the date of this Direction, under the direction and supervision of the Regional Director for the Region in which this case was heard, and subject to Sections 102.61 and 102.62 of National Labor Relations Board Rules and Regulations,
17 among the employees in the unit found appropriate in paragraph numbered 4, above, who were employed during the payroll period immediately preceding the date of this Direction of Election, including employees who did not work during said payroll period because they were ill or on vacation or temporarily laid off, and employees in the military services of the United States who appear in person at the polls, but excluding those employees who have since quit or been discharged for cause and have not been rehired or reinstated prior to the date of the election,

[8] In view of our unit finding above, which corresponds substantially to the unit in the amended petition, we deny the motion to dismiss on the grounds (1) that the unit set forth in the original petition is too limited, and (2) that the unit set forth in the amended petition is not comprehensive enough.

and also excluding employees on strike who are not entitled to reinstatement, to determine whether or not they desire to be represented, for purposes of collective bargaining, by Buffalo Section, Westinghouse Engineers Association, Engineers and Scientists of America, by Buffalo Salaried Employees Association, Incorporated, or by neither.

Dated, Washington, D. C., May 28, 1956.

BOYD LEEDOM, *Chairman*

ABE MURDOCK, *Member*

IVAR H. PETERSON, *Member*

PHILIP RAY RODGERS, *Member*

STEPHEN S. BEAN, *Member*

NATIONAL LABOR RELATIONS BOARD

(SEAL)

---

18 Filed July 12, 1956

Exhibit "B"

WESTERN UNION

Telegram

1956 Jun 13 PM 2 32

NA 137 GOVT LONG PD-WUX NEW YORK NY 13 15 1P-
NY MAYER WEINER AND MAYER, ATT JONAS SILVER ESQ-
19 West 44 St-
-RE WESTINGHOUSE ELECTRIC CORP., 3-RC 1634. IT IS HEREBY ORDERED THAT THE PETITIONER'S MOTION TO STAY ELECTION, RECONSIDER AND AMEND DECISION AND DIRECTION OF ELECTION, AND REQUEST FOR ORAL ARGUMENT, THE INTERVENOR'S MOTION FOR RECONSIDERATION AND THE EMPLOYER'S PETITION FOR RECONSIDERATION BE, AND THEY HEREBY ARE, DENIED ON THE GROUND THAT NOTHING HAS BEEN PRESENTED THAT WAS NOT PREVIOUSLY CONSIDERED BY THE BOARD. BY DIRECTION OF THE BOARD-
-OGDEN W FIELDS NATIONAL LABOR RELATIONS BOARD WASHINGTON DC-

19 Filed July 12, 1956

Exhibit "C"

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

In the Matter of

WESTINGHOUSE ELECTRIC CORPORATION, *Employer*

and

BUFFALO SECTION, WESTINGHOUSE ENGINEERS ASSOCIATION, ENGINEERS AND SCIENTISTS OF AMERICA, *Petitioner*

Type of Election
☐ Consent Agreement
X Board Ordered
☐ Stipulation

Case No. 3-RC-1634

Certification of Representatives

An election having been conducted in the above matter by the undersigned Regional Director of the National Labor Relations Board in accordance with the Rules and Regulations of the Board; and it appearing from the Tally of Ballots that a collective bargaining representative has been selected; and no objections having been filed to the Tally of Ballots furnished to the parties, or to the conduct of the election, within the time provided therefor;

Pursuant to authority vested in the undersigned by the National Labor Relations Board,

IT IS HEREBY CERTIFIED that BUFFALO SECTION, WESTINGHOUSE ENGINEERS ASSOCIATION, ENGINEERS AND SCIENTISTS OF AMERICA has been designated and selected by a majority of the employees of the above-named Employer, in the unit herein involved, as their representative for the purposes of collective bargaining, and that, pursuant to Section

9 (a) of the Act as amended, the said organization is the exclusive representative of all the employees in such unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

Signed at Buffalo, New York
on the 21st day of June, 1956.

(SEAL)

On behalf of

NATIONAL LABOR RELATIONS BOARD
MERLE D. VINCENT, JR.
Regional Director for Third Region
National Labor Relations Board

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20 Filed September 11, 1956

Motion of Defendants to Dismiss the Complaint or, in the Alternative, for Summary Judgment in Their Favor

Come now the defendants, by their attorneys, and in opposition to plaintiff's motion for a permanent injunction, move as follows:

1. That the complaint herein be dismissed because:

(a) This Court is without jurisdiction of the subject matter of the action;

(b) The complaint fails to state a claim warranting judicial relief.

2. In the alternative, that summary judgment for defendants be granted, on the basis of the complaint, including the exhibits attached thereto, and the copy of the tally of ballots from the official files of the National Labor Relations Board, which is attached hereto as Exhibit 1 and is made a part of this motion.

WHEREFORE, it is respectfully requested that plaintiff's motion for a permanent injunction be denied, and that the relief requested by the defendants be granted.

MARCEL MALLET-PREVOST
/s/ Marcel Mallet-Prevost
Assistant General Counsel

NORTON J. COME,
JOHN E. JAY,
Attorneys,
National Labor Relations Board,
Attorneys for Defendants.
4th & C Streets, S.W.,
Washington 25, D.C.

Dated September 11, 1956.

---

21 Filed September 11, 1956

Exhibit 1

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

In the Matter of

WESTINGHOUSE ELECTRIC CORPORATION

and

WESTINGHOUSE ENGINEERS ASSOCIATION, BUFFALO SECTION, ENGINEERS AND SCIENTISTS OF AMERICA

Case No. 3-RC-1634
Date issued June 14, 1956
Type of election Board ordered

TALLY OF BALLOTS

The undersigned agent of the Regional Director certifies that the results of the tabulation of ballots cast in the

election held in the above case, and concluded on the date indicated above, were as follows:

1. Approximate number of eligible voters	245
2. Void ballots	None
3. Votes cast for Westinghouse Engineers Assn., Buffalo Section	126
4. Votes cast for Buffalo Salaried Employees Assn., Inc.	80
5. Votes cast for	
6. Votes cast against participating labor organization(s)	20
7. Valid votes counted (sum of 3, 4, 5, and 6)	226
8. Challenged ballots	2
9. Valid votes counted plus challenged ballots (sum of 7 and 8)	228
10. Challenges are (*not*) sufficient in number to affect the results of the election.	
11. A majority of the valid votes has been cast for Westinghouse Engineers Association.	

For the Regional Director

EDWARD H. NOONAN, JR.

The undersigned acted as authorized observers in the counting and tabulating of ballots indicated above. We hereby certify that the counting and tabulating were fairly and accurately done, that the secrecy of the ballots was maintained, and that the results were as indicated above. We also acknowledge service of this tally.

For Westinghouse Electric Corporation
DAVID L. TRUMPFHELLER

For Buffalo Salaried Employees Assn., Incorporated
HARRY E. MONHEIM

For Westinghouse Engineers Assn., Buffalo Section, Engineers and Scientists of America
EUGENE P. ROSS

23 Filed September 29, 1956

Cross-Motion of Plaintiff for Summary Judgment in Its Favor.

Comes now the plaintiff, by its attorneys, and in opposition to defendant's motion to dismiss the Complaint or in the alternative for summary judgment in favor of defendants, moves that summary judgment for plaintiff be granted upon the ground that there are no palpable questions of fact involved in this case and that plaintiff is entitled to judgment as a matter of law, in accordance with the correct construction of the controlling provisions of the Labor Management Relations Act of 1947. Plaintiff therefore prays that this Court make an Order granting the relief sought in the Complaint.

Respectfully submitted,

MAYER, WEINER & MAYER
Attorneys for Plaintiff

By: ABRAHAM WEINER
19 West 44th Street
New York 36, N. Y.

JAFFEE & DUNAU
Attorneys for Plaintiff

By: SAMUEL H. JAFFEE
912 DuPont Circle Building, N.W.
Washington 6, D. C.

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25 **Minute Entry of Clerk**

Dec. 3, 1956 Motions (1) To Dismiss "Denied" (2) Motion by pltf. for summary judgt. "Granted"

MATTHEWS, J.

26 Filed Dec. 19, 1956

Findings of Fact and Conclusions of Law

This cause came on to be heard on October 24, 1956, on defendants' motion to dismiss the complaint or, in the alternative, for summary judgment in their favor, and on plaintiff's cross-motion for summary judgment in his favor. The Court, having heard argument, considered the memoranda submitted by the parties and amici,[1] and being fully advised in the premises, makes the following findings of fact and conclusions of law:

Findings of Fact

The pleadings and exhibits annexed thereto show, and the parties agree, that no genuine issue as to any material fact exists. Based thereon, the Court finds as follows:

27 1. Buffalo Section, Westinghouse Engineers Association, Engineers and Scientists of America, herein called the Union, is a voluntary unincorporated labor organization, maintaining its principal office for the transaction of its regular business at P. O. Box No. 2528, Cheektowaga, New York. Plaintiff, William Kyne, is its president.

2. Membership in the Union is open to all non-supervisory professional engineers and scientists employed at the Cheektowaga, New York, plant of Westinghouse Electric Corporation. The Union exists for the purpose of enhancing the economic and professional status of engineers and scientists who are professional employees as defined in Section 2 (12) of the Labor Management Relations Act, 1947, (herein called the Act), through collective bargaining with Westinghouse Electric Corporation. Section 2 (12) of the Act provides that:

[1] The National Society of Professional Engineers and the Engineers Joint Council were granted leave to file memoranda in support of the plaintiff's cross-motion for summary judgment.

(12) The term "professional employees" means—

"(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine, mental, manual, or physical processes; or

"(b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

3. Westinghouse Electric Corporation is engaged in an industry or activity affecting commerce within the meaning of Sections 2 (6) and 2 (7) of the Act.

28 4. On or about October 14, 1955, plaintiff filed a petition for certification of representatives with the Regional Director of the National Labor Relations Board for the Third Region, alleging that a substantial number of employees, occupying the job descriptions of Engineer Assistant, Engineer Associate, Engineer, Engineer Senior and Engineer Fellow, at the Cheektowaga, New York, plant of Westinghouse Electric Corporation, wish to be represented for purposes of collective bargaining by the Union, and the Union desires to be certified as

the representative of these employees pursuant to Sections 9 (a) and (c) of the Act. The petition was given Case No. 3-RC-1634 by the Regional Director of the National Labor Relations Board for the Third Region.

5. Upon the petition filed by plaintiff, a hearing was conducted on March 7 and 8, 1956, in Buffalo, New York, by an officer duly designated by the Regional Director, pursuant to Section 9 (c) of the Act. At the hearing, by amendment to the petition, the Union sought to represent all professional employees within the meaning of Section 2 (12) of the Act at the Cheektowaga, New York, plant of the Westinghouse Electric Corporation. These included, in addition to the five categories originally named in the petition (listed in paragraph 4 above), the further five categories of Manufacturing Engineer, Manufacturing Engineer Senior, Plant Layout Engineer, Methods Engineer and Purchasing Engineer.

6. At the hearing, Buffalo Salaried Employees Association, Incorporated, a labor organization, was permitted to intervene in the proceedings. The Intervenor alleged that, in addition to the ten categories sought by plaintiff in the amended petition (listed in paragraphs 4 and 5 above), the further categories of Engineer Order Service, Engineer Test Record, Engineer Contact, Order Correspondent Master, and Safety Inspector were also comprised of professional employees within the meaning of Section 2 (12) of the Act and should be included
29 within the bargaining unit together with all the professional employees covered by the amended petition.

7. On May 28, 1956, the National Labor Relations Board, whose Chairman and Members comprise the defendants herein, issued its Decision and Direction of Election in the representation proceeding, reported at 115 NLRB No. 228. The Board found that the ten categories sought to be included in the bargaining unit by plaintiff com-

prise professional employees within the meaning of Section 2 (12) of the Act. It further found that the additional categories sought by the Intervenor—Engineer Order Service, Engineer Test Record, Engineer Contact, Order Correspondent Master, and Safety Inspector—do not comprise professional employees within the meaning of Section 2 (12) of the Act. The Board further concluded that the non-professional employees occupying the 3 job classifications of Engineer Order Service, Engineer Test Record and Engineer Contact, shared a "close community of employment interests" with the professional engineers, in that these employees "have had considerable education and experience in the engineering field, are occasionally transferred to the professional engineering categories, work in the same general area and under common supervision with the admittedly professional engineering employees, spend much of their time collaborating and consulting with these professional employees," and were "included with the admittedly professional engineers in the voting group in the 1946 election" conducted by the Board. Under these circumstances, and, as "the addition of the 9 employees in these categories to the unit of 233 employees stipulated to be professional would [not] destroy the predominantly professional character" of the unit proposed for the professional employees, the Board included the 3 non-professional job classifications in the professional unit. Accordingly, the Board determined the appropriate unit to be, as follows:

> All professional employees, including the categories of engineer assistant, engineer associate, engineer, engineer senior, engineer fellow, manufacturing engineer, manufacturing engineer senior, plant layout engineer, methods engineer (formerly time and motion analyst), purchasing engineer, engineer order service, engineer test record, and engineer contact, but excluding the categories of machine designer, order corre-

spondent master, and safety inspector, all other employees, guards, and supervisors as defined in the Act.

Thus the Board found that all professional employees at the Cheektowaga, New York, plant of Westinghouse Electric Corporation, including the ten named categories sought by plaintiff, *plus* three categories of non-professional employees—Engineer Order Service, Engineer Test Record, and Engineer Contact—constitute an appropriate unit for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act. The Board directed that, not later than thirty days from the date of its Direction, an election be conducted among the employees in this unit to determine whether or not they desire to be represented, for purposes of collective bargaining, by the Union, by the Intervenor, or by neither. The Board refused to direct a vote among the professional employees as such to decide whether or not they wished to be included in a unit together with the non-professional employees.

8. On June 7, 1956, plaintiff filed with the National Labor Relations Board a Motion to Stay Election, Reconsider And Amend Decision And Direction Of Election, And Request For Oral Argument. Plaintiff alleged that the Board acted in excess of its statutory authority by including, in the same bargaining unit, professional and non-professional employees without having first accorded such professional employees an opportunity to determine by majority vote whether or not they wished to be included in such unit, as required by Section 9 (b) (1) of the Act. Section 9 (b) (1) provides that:

31 "... the Board shall not (1) decide that any unit is appropriate for such [collective bargaining] purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit. ..."

On June 13, 1956, the Board denied this motion.

9. On June 14, 1956, an election by secret ballot was held under the direction of the Regional Director of the National Labor Relations Board for the Third Region among the employees in the unit found appropriate by the Board, including the non-professional employees, without the professional employees having been first accorded an opportunity to determine by vote whether or not they wished to be included in such unit. Of the 226 valid votes cast, 126 valid votes were cast for the Union, it thereby receiving a majority of the valid votes cast. On June 21, 1956, the Union was certified by the Regional Director of the National Labor Relations Board for the Third Region, acting on behalf of the National Labor Relations Board, as the exclusive bargaining representative of the professional and non-professional employees at the Cheektowaga, New York, plant of the Westinghouse Electric Corporation, in the unit that the Board had found appropriate.

10. On July 12, 1956, plaintiff filed his complaint in this Court. Plaintiff alleged that defendants, Chairman and Members of and constituting the National Labor Relations Board, exceeded the scope of their statutory authority in refusing to direct a vote among the professional employees as such to determine whether they wish to be included in the unit with nonprofessional employees; and that the consequence of that refusal is irreparably to deny and destroy the statutory right to have a unit include only professional employees unless a majority of the professional employees vote for the inclusion of non-professional employees. Plaintiff prayed for a permanent injunction requiring defendants to set aside the Decision and Direction of Election, to the extent that it failed to provide
32 for an election among the professional employees to determine whether or not a majority of them desired to be included within a unit with non-professional employees; to set aside the election conducted on June 14, 1956; to set aside the certification of representatives dated

June 21, 1956; and enjoining the defendants from processing the petition unless it conducted its investigation to ascertain representatives for purposes of collective bargaining as required by Section 9 (b) (1) of the Act.

Conclusions of Law

1. This Court has jurisdiction to entertain the merits of the complaint inasmuch as the question presented for determination is whether or not defendants exceeded the scope of their statutory authority under the terms of Section 9 (b) (1) of the Labor Management Relations Act, 1947. *Farmer* v. *United Electrical Workers*, 211 F. 2d 36, 40 (C.A.D.C.), cert. denied, 347 U.S. 943; *DePratter* v. *Farmer*, 232 F. 2d 74, 75 (C.A.D.C.).

2. The defendants found that professional and non-professional employees together comprise a unit appropriate for purposes of collective bargaining without first conducting a separate election among the professional employees to determine whether a majority of them favor inclusion within a unit with non-professional employees. Section 9 (b) (1) of the Act states explicitly that "the Board *shall not* (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit. . ." (emphasis added). The Board has no statutory warrant to disregard this mandatory limitation upon its authority because in its view the commingling of professional and non-professional employees would not "destroy the predominantly professional character of such a unit," without conducting the requisite election in which a majority of such professional employees vote for inclusion in such unit. The refusal of de-
33 fendants to conduct the required election works irreparable harm to the statutory right that an appropriate unit for collective bargaining purposes shall include only professional employees unless a majority of them

vote for the inclusion of non-professional employees within the unit.

3. Accordingly, defendants' motion to dismiss the complaint or, in the alternative, for summary judgment is denied; the plaintiff's motion for summary judgment is granted; and an appropriate order in conformity herewith will be entered.

BURNITA SHELTON MATTHEWS
Judge

Dated: December 19, 1956

No objection as to form:

MARCEL MALLET-PREVOST
Attorney for Defendants,

December 18, 1956.

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34 Filed December 19, 1956

Order

This cause having been heard on October 24, 1956, on defendants' motion to dismiss the complaint or, in the alternative, for summary judgment in their favor, and on plaintiff's cross-motion for summary judgment in his favor; and the Court, having heard argument, considered the memoranda submitted, and, being fully advised in the premises, having made its findings of fact and conclusions of law; now, therefore, on this 19th day of December, 1956, the Court orders, adjudges and decrees that:

1. Defendants' motion to dismiss the complaint or, in the alternative, for summary judgment in their favor is denied.

2. Plaintiff's motion for summary judgment is granted.

3. Defendants, their officers, agents, servants, employees and attorneys, and all persons in active concert or partici-

pation with them who receive actual notice of this order, shall: (a) set aside and vacate the Decision and Direction of Election in Case No. 3-RC-1634, dated May 28, 1956, to the extent that it determines that a unit for collective bargaining purposes may include both professional and non-professional employees in the same unit without affording the professional employees an opportunity to vote on whether or not they desire to be included in the same unit with non-professional employees; (b) set aside and vacate the election conducted on June 14, 1956, in Case No. 3-RC-1634; (c) set aside and vacate the certification of representatives issued on June 21, 1956, in Case No. 3-RC-1634; and (d) further process the petition filed in Case No. 3-RC-1634 in accordance with customary procedures, provided that a unit including both the professional employees in that case and non-professional employees shall not be found appropriate for purposes of collective bargaining, unless the professional employees are afforded an opportunity to vote on whether or not they desire to be included in the same unit with non-professional employees.

4. The execution of paragraph 3 of this Order shall be stayed pending disposition of defendants' appeal from the Order.

BURNITA SHELTON MATTHEWS
Judge

No objection as to form:

MARCEL MALLET-PREVOST
Attorney for Defendants

December 18, 1956.

36 Filed December 19, 1956

Motion of Defendants to Drop Ivar H. Peterson as a Party Defendant

Come now the defendants, by their attorneys, and move the Court for an order dropping Ivar H. Peterson as a party defendant to this action. In support of this motion, defendants show as follows:

1. On August 27, 1956, during the pendency of this action, the term of Ivar H. Peterson as a member of the National Labor Relations Board expired in accordance with the provisions of Section 3(a) of the National Labor Relations Act, as amended.

2. No successor has as yet been appointed to the vacancy created by the expiration of Member Peterson's term.

3. The four remaining parties defendant are thus, at present, the sole members of the National Labor Relations Board vested with the powers under the Act to grant the affirmative relief prayed for by plaintiff in the complaint.

37 WHEREFORE, it is respectfully requested that defendants' motion to drop Ivar H. Peterson as party defendant be granted.

Dated December 18, 1956.

MARCEL MALLET-PREVOST
Marcel Mallet-Prevost
Assistant General Counsel

Consented to this 18 day of December, 1956.

BERNARD NUMAN
Counsel for Plaintiff

38 Filed December 19, 1956

Order Dropping Ivar H. Peterson as a Party Defendant

Pursuant to defendants' motion, which has been consented to by plaintiff, the Court orders, adjudges and decrees that:

IVAR H. PETERSON is hereby dropped as a party defendant to this action.

Dated this 19th day of December, 1956.

BURNITA SHELTON MATTHEWS
United States District Judge

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39 Filed December 27, 1956

Notice of Appeal

Notice is hereby given that Boyd S. Leedom, Abe Murdock, Philip Ray Rodgers, and Stephen S. Bean, defendants herein, hereby appeal to the Court of Appeals for the District of Columbia Circuit from the final judgment entered in this action on December 19, 1956.

MARCEL MALLET-PREVOST
Marcel Mallet-Prevost
Assistant General Counsel

NATIONAL LABOR RELATIONS BOARD
Attorney for Defendants

December 26, 1956.

40 Filed December 27, 1956

Designation of Contents of Record on Appeal

The Defendants herein hereby designate, as the record on appeal to the Court of Appeals for the District of Columbia Circuit, the entire record of the proceedings before the District Court in this action including the following:

1. The complaint for injunction, dated July 10, 1956.

2. Motion of defendants to dismiss the complaint or, in the alternative, for summary judgment, dated September 11, 1956.

3. Cross-motion of plaintiff for summary judgment, served on September 29, 1956.

4. Minute entry of District Court denying defendants' motion and granting plaintiff's cross-motion.

5. Findings of Fact and Conclusions of Law, entered by the District Court on December 19, 1956.

6. Order entered by the District Court on December 19, 1956, granting judgment for plaintiff.

7. Defendants' motion to drop Ivar H. Peterson as a party defendant, and the order of the District Court granting such motion.

41 8. Notice of Appeal.

9. This designation.

MARCEL MALLET-PREVOST
Marcel Mallet-Prevost
Assistant General Counsel

NATIONAL LABOR RELATIONS BOARD
Attorney for Defendants

December 26, 1956.

36 [File endorsement omitted.]

In United States Court of Appeals for the District of Columbia Circuit

No. 13701

BOYD S. LEEDOM, et al., individually and as Chairman and Members of and Constituting the NATIONAL LABOR RELATIONS BOARD, APPELLANTS

v.

WILLIAM KYNE, individually and as President of Buffalo Section, WESTINGHOUSE ENGINEERS ASSOCIATION, ENGINEERS and SCIENTISTS of AMERICA, a voluntary unincorporated Labor Organization, APPELLEE

Appeal from the United States District Court for the District of Columbia

Mr. Norton J. Come, Attorney, National Labor Relations Board, with whom *Messrs. Charles Stephen Leonard*, Associate General Counsel, National Labor Relations Board, and *Marcel Mallet-Prevost*, Assistant General Counsel, National Labor Relations Board, were on the brief, for appellants.

Mr. Jonas Silver, with whom *Mr. Bernard Dunau* was on the brief, for appellee. *Mr. Samuel H. Jaffee* also entered an appearance for appellee.

Mr. Milton F. Lunch filed a brief on behalf of National Society of Professional Engineers, as *amicus curiae*, urging affirmance.

37 *Messrs. Gerard D. Reilly* and *Joseph C. Wells* filed a brief on behalf of Engineers Joint Council, as *amicus curiae*, urging affirmance.

Opinion

September 16, 1957

Before BAZELON, BASTIAN and BURGER, Circuit Judges.

BAZELON, *Circuit Judge:* Appellee, President of the Westinghouse Engineers Association,[1] brought this suit against appel-

[1] The full name of this organization is Buffalo Section, Westinghouse Engineers Association, Engineers and Scientists of America.

lant members of the National Labor Relations Board to set aside a certification under § 9 of the National Labor Relations Act. The unit certified consisted of 233 admittedly professional employees, within the meaning of § 2 (12) of the Act, whom the Engineers Association had sought to represent; and 9 others, admittedly non-professional, whom the Board included, over objection of the Engineers Association, because they share a "close community of employment interest" with the professionals and their inclusion would not "destroy the predominantly professional character" of the unit. The District Court, however, agreed with the Engineers Association that inclusion of these non-professionals violated § 9 (b) which provides, in pertinent part, "that the Board shall not (1) decide that any unit is appropriate for [purposes of collective bargaining] if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit." Accordingly, on cross motions, the court granted summary judgment in favor of appellee and against appellants.

On this appeal, as in the court below, the Board takes the familiar position that, under § 9 (d), its determinations in representation proceedings are reviewable only in the courts of appeals and only when they have become the
38 basis for a "final order" in an unfair labor practice proceeding under § 10. It relies heavily on *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297 (1943).

"Before we can decide whether these proceedings are reviewable in an original equity suit in the District Court, there must be a showing 'of unlawful action by the Board and resulting injury . . . by way of departure from statutory requirements or from those of due process.' *Inland Empire District Council, etc.* v. *Millis*, 1945, 325 U. S. 697, 700, 65 S. Ct. 1316, 89 L. Ed. 1877." *DePratter* v. *Farmer*, 98 U. S. App. D. C. 74, 76, 232 F. 2d 74, 76 (1956). Equitable relief is clearly barred in the wide area of determinations which depend on the Board's expertise and discretion; as for example, in *Switchmen's Union*, that railroad yardmen should be included in a unit with certain other smaller groups of railroad employees, or, in *DePratter*, that full time production employees should be included in a unit with employees who devote only part time to production and the rest to other tasks.

This case, however, presents "a different 'type of problem.'"[2] Section 9 (b) (1) expressly forbids inclusion of professionals and non-professionals in the same bargaining unit "*unless* a majority of [the] professional employees vote for inclusion in such unit." It is clear that this provision was intended to protect the professionals; that the professionals' right to this benefit does not depend on Board discretion or expertise; and that denial of this right must be deemed to result in injury. Thus this case presents Board violation of a statutory requirement and resulting injury.

39 Whether, granting the availability of a § 10 remedy, the injury flowing from the violation of § 9 (b) (1) would support equitable relief need not be decided. Here review by way of § 10 is too remote and conjectural to be viewed as providing an adequate remedy. *Farmers* v. *United Electrical, Radio & Machine Workers*, 93 U. S. App. D. C. 178, 211 F. 2d 36 (1953). Since the employer is not aggrieved by the Board's inclusion of the nine non-professionals, he cannot be relied upon to refuse to bargain and thus make it possible for the Association to bring a reviewable § 10 proceeding. Nor is it likely that an Engineers Association refusal to bargain for the nine non-professionals would induce the employer to seek review since he would then be free to deal with all employees individually. Nor could we expect such refusal to induce any of the nine non-professionals to seek review. They are hardly likely to insist upon placing their fate in the hands of a reluctant bargaining representative.

Affirmed.

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[2] *Air Line Dispatchers Ass'n* v. *National Mediation Board*, 89 U. S. App. D. C. 24, 27, 189 F. 2d 685, 688 (1951); see also *Farmer* v. *United Electrical, Radio & Machine Workers*, 93 U. S. App. D. C. 178, 211 F. 2d 36 (1953), *cert. denied*, 347 U. S. 943 (1954); *Leedom* v. *International Union*, 352 U. S. 145 (1956).

40 [File endorsement omitted.]

In United States Court of Appeals for the District of Columbia Circuit

No. 13,701

C. A. 2909–56

BOYD S. LEEDOM, et al., individually and as Chairman and Members of and Constituting the NATIONAL LABOR RELATIONS BOARD, APPELLANTS

v.

WILLIAM KYNE, individually and as President of Buffalo Section, WESTINGHOUSE ENGINEERS ASSOCIATION, ENGINEERS and SCIENTISTS of AMERICA, a voluntary unincorporated Labor Organization, APPELLEE

Appeal from the United States District Court for the District of Columbia

Before BAZELON, BASTIAN and BURGER, Circuit Judges.

Judgment

September 16, 1957

This cause came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

Per *Circuit Judge* BAZELON.

42 [Clerk's Certificate to foregoing transcript omitted in printing]

43 Supreme Court of the United States

No. 633, October Term, 1957.

BOYD S. LEEDOM, et al., individually and as Chairman and Members of and Constituting the NATIONAL LABOR RELATIONS BOARD, PETITIONERS

v.

WILLIAM KYNE, individually and as President of Buffalo Section, WESTINGHOUSE ENGINEERS ASSOCIATION, etc.

Order allowing certiorari

January 13, 1958

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE 1958